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Attorney Referral for Medical Treatment: A Wolf in Disguise.

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ATTORNEY REFERRAL FOR MEDICAL TREATMENT: A WOLF IN DISGUISE?

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I. INTRODUCTION[1]

Attorneys encounter people with injuries on a daily basis. From attorneys practicing in large personal injury firms to the proverbial "ambulance chaser," civil litigators routinely meet, counsel, and ultimately represent the injured plaintiff seeking redress. Despite some attorneys' promises of success, however, not all client's claims will prevail. As any litigator knows, juries can do strange things.

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1. This Article applies the simple truth of *Little Red Riding-Hood* to one of the oldest practices in Texas personal injury litigation: attorney referral for medical treatment. As Little Red Riding-Hood explained:

> When she saw her grandmother, as she thought, lying in bed, she went up to her and drew back the curtains; but she could only see the head, for the wolf had pulled the nightcap as far over his face as he could.
> "Good-morning," she said; but there was no answer. Then she got on the bed, and cried out, 'Oh, grandmother, what great ears you have got!"
> "The better to hear with, my dear," he said.
> "And what great eyes you have got!"
> "The better to see with, my dear."
> "And, grandmother, what large hands you have got!"
> "The better to hold you, my dear."
> "But, grandmother, what great teeth you have got!" cried Red Riding-Hood, who began to be frightened.
> "The better to eat you!" cried the wolf, jumping from the bed; and, seizing poor Red Riding-Hood, he swallowed her up at one mouthful.
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> A hunter, who was out with his gun, was passing by, and thought to himself, "How the old woman snores; I must go in and see what is the matter."
> Then he stepped into the room, and when he came to the bed he saw the wolf lying on it.
> "Oh, you old sinner," said the hunter, "have I found you at last? I have been seeking you a long time, Mr. Wolf."
> . . . [H]e would not shoot, but, took a pair of scissors, cut open the stomach of the sleeping wolf.
> How surprised he was to see the smiling face of Red Riding-Hood peep out at the first snap; and as he cut further, she sprang out, exclaiming: "Oh, I have been so frightened; it was dreadfully dark in the wolf's stomach!"
> . . . "Ah," she thought, "I will never go out of my way to run in the wood again. . ."

Little Red Riding-Hood

This Article, as in *Little Red Riding-Hood*, explores whether the wolf should be exposed so the truth shall be known. The "wolf" is the attorney referral for medical treatment. "Little Red Riding-Hood" is the jury, and this Article serves as the "hunter" to discover the truth about "grandma."

The Texas judicial system empowers juries with wide discretion in determining witness credibility.[2] This empowerment particularly applies to expert testimony.[3] Even if an expert survives the various legal challenges to his or her qualifications, the jury may accept or reject the expert's opinions because of the expert's credibility or lack thereof. Before a jury hears a witness' testimony, however, the judge must first determine the admissibility of evidence,[4] so the "truth may be ascertained and proceedings justly determined."[5] Given the wide discretion afforded a judge's admissibility determination, the question often arises whether the judge has allowed the jury to review all the evidence necessary to ascertain the truth.[6]

Although the Texas Rules of Civil Procedure allow broad discovery of material before litigation,[7] some information remains undiscoverable.[8] In particular, a party may not discover privileged information.[9] Most attorney-client communications fall within the

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2. *See* Leyva v. Pacheco, 163 Tex. 638, 358 S.W.2d 547, 549 (Tex. 1962) (explaining that the jury is the sole judge of the witnesses' credibility and discussing the amount of weight to be given to their testimony); *cf.* McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986) (declaring that the jury has great discretion in assessing personal injury damages).

3. *See* Biggs v. GSC Enters., Inc., 8 S.W.3d 765, 769 (Tex. App.—Fort Worth 1999, no pet.) (affirming the court's statement in *Leyva* that the jury is the sole judge of a witnesses' credibility and agreeing with the amount of weight to be given their testimony); Rivas v. Garibay, 974 S.W.2d 93, 96 (Tex. App.—San Antonio 1998, pet. denied) (stating that a "jury may disbelieve any witness" including testimony of a physician even though the testimony is disputed); Barrajas v. VIA Metro. Transit Auth., 945 S.W.2d 207, 208 (Tex. App.—San Antonio 1997, no writ) (noting that, on the issue of damages, a jury is not bound by expert testimony).

4. *See* TEX. R. EVID 104(a) (providing "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court"); *see also* Brown v. Perez, 89 Tex. 282, 34 S.W. 725, 728 (1896) (declaring that the trial court has broad discretion regarding the admissibility of evidence because the trial court can "better understand the circumstances surrounding the trial").

5. TEX. R. EVID. 102.

6. *See* Chief Justice Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 4 (1998) (arguing that since 1988, a more conservative Texas Supreme Court has increasingly overturned jury verdicts). Justice Hardberger criticizes the court's trend towards upholding summary judgments and directed verdicts, as well as applying stricter standards to jury assessments, all of which essentially limit the power of the juries. *See id.* at 4-5, 12.

7. *See* TEX. R. CIV. P. 192.3 (stating that a party "may obtain discovery regarding any matter that is not privileged and is relevant").

8. *See id.* (providing that discovery may be had on "any matter that is not privileged"); *see generally* TEX. R. EVID. 501-13. (setting out the rules of privileges).

9. *See* TEX. R. CIV. P. 192.3.

ambit of protected privileges.[10] However, not all attorney-client communications receive protection.[11] For personal injury litigators, an important issue becomes whether the attorney-client privilege protects attorney referrals to physicians for medical treatment.[12]

This Article addresses attorney referrals to physicians and whether the details of such arrangements are protected by the attorney-client privilege. Part I of this Article reveals how attorney referrals for medical treatment work. Part II provides an overview of the attorney-client privilege in the context of attorney referral for medical treatment. Part III critically analyzes the only Texas Supreme Court decision regarding the issue, as well as implications involving the attorney-client privilege. Finally, Part IV concludes that the attorney-client privilege does not prevent the discovery and admission of evidence at trial indicating attorney referral for medical treatment.

II. Attorney Referral for Medical Treatment

A. *Post-Injury Medical Referrals*

The following hypothetical illustrates a common occurrence giving rise to a personal injury suit. Two cars collide at a busy intersection. One of the drivers denies receiving any injury at the scene and rejects medical attention. Within a few days, however, the driver decides to retain an attorney. After determining the facts of the accident, the attorney refers the new client to a particular physician or chiropractor who specializes in treating accident victims. The attorney's office schedules the appointment with the treating physician, and the attorney forwards the treating physician a "let-

10. Tex. R. Evid. 503(b).

11. *See* Tex. R. Evid. 503(b)(1) (setting forth the general rule of privilege and the elements that must be satisfied before the attorney-client privilege is conferred).

12. *See, e.g.*, Sawyer v. Duncan, No. 78056, 2000 WL 1844758, at *4 (Ohio Ct. App. Dec. 14, 2000) (holding that the evidence of attorney referral to the medical provider was admissible to support verdict for defendant); Burt v. Gov't Employees Ins. Co., 603 So. 2d 125, 125-26 (Fla. Dist. Ct. App. 1992) (holding that the deposition question regarding whether the plaintiff was referred by her attorney to a particular physician was protected by the attorney-client privilege); Lambert v. Faucheux Chevrolet Co., 161 So. 2d 344, 346 (La. Ct. App. 1964) (concluding that plaintiff could not recover specific medical expenses from a doctor located 90 miles away from his home because such treatment was clearly for trial purposes and not medical treatment).

ter of protection," which is a promise to pay the medical bills after settling the claim. After the initial visit, the treating physician bills the attorney directly and waits for the claim to settle.

Unbeknownst to the client, the visits to the treating physician began what has become a routine practice for attorneys, physicians, and chiropractors that has the potential of resulting in disingenous and frivolous lawsuits. The danger lies in the nature of the relationship between the attorney and the treating physician. Specifically, attorneys often refer clients to the same physician or chiropractor regardless of the injury. The problem arises when the attorney and physician have a pre-existing arrangement prior to the client's initial contact with the attorney.

The arrangement consists of an agreement that the attorney will pay no money until after settling the client's claim. Such an arrangement also includes a provision whereby the attorney and treating physician agree that the more referrals the attorney makes to the treating physician, the more the treating physician will reduce the medical bills.[13] For example, if the attorney refers five clients a month to the treating physician, the treating physician will reduce the medical bills by thirty percent. If the attorney refers ten clients a month, the treating physician will reduce the medical bills by fifty percent. This reduction in the amount of money owed to the treating physician represents money in the referring attorney's pocket. Once the client receives full settlement, the doctor receives payment for the discounted bills and the attorney retains the difference.

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13. *See, e.g.*, Caryolyn Nielsen, *Corrupt Chiropractors Target of Sting; 20 Arrests Are Made; Two-year Operation in Riverside County Alleges Insurance Fraud*, THE FRESNO BEE, Nov. 23, 1996, at B4 (reporting that evidence gathered in a two-year sting operation against chiropractors revealed "[d]octors, chiropractors, and office managers would give their 'patients' one or no treatments, then billed the insurance company for several treatments. . . .[t]he practitioner would then kick back 15 percent to 33 percent of the insurance money to the 'lawyer'"); Mack Reed, *12 Arrested in Ventura County Raids at 26 Sites Crime: Crackdown Follows Yearlong Sting Directed at Chiropractors and Lawyers Who Allegedly 'Buy' Patients and Bilk Insurers*, L.A. TIMES, Dec. 2, 1994, at 3 (reporting that a yearlong sting operation targeting lawyers and chiropractors for insurance fraud came to an end and revealed "[s]ome suspects paid fees of $300 per patient, while others agreed to kick back 30% of the insurance payments"), 1994 WL 2374160.

B. *Presentation of the Claims and Filing Suit*

As in most tort claims similar to the car accident hypothetical, after assessing property and personal injury damages, the plaintiff files a claim with the responsible party's insurance company. Thereafter, the insurer typically requests the plaintiff's medical bills for review. Although an insurer may question the reasonableness of the medical bills, rather than defending the claim and incurring the high costs associated with litigation, the insurer often makes an offer to settle the case in the amount equal to the medical bills. The conflicts that lead to litigation arise when the settlement offer falls short of additional damages sought.

1. Deposing the Plaintiff

After filing suit against the responsible party,[14] discovery begins. Discovery of the plaintiff's attorney's physician referral often constitutes an elaborate waltz between opposing counsel. Having reviewed the plaintiff's medical records, the insurer's attorney takes the plaintiff's deposition. At the deposition, the insurer's attorney asks the plaintiff if the plaintiff's attorney referred him to the treating physician.[15] The plaintiff's attorney instructs the client not to respond, claiming the testimony falls under the attorney-client privilege. The insurer's attorney then asks whether the plaintiff had ever heard of the treating physician before retaining an attorney. The plaintiff admits to not personally having known the treating physician prior to consulting with his attorney. Further the plaintiff admits to retaining an attorney before seeking medical treatment.[16]

2. Deposing the Treating Physician

After deposing the plaintiff, the plaintiff's attorney next takes the deposition of the plaintiff's treating physician. The insurer's

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14. This hypothetical is for either the third-party (when an insured sues a responsible third party) or first-party (when insured sues their insurer) context.

15. *See, e.g.*, *Burt*, 603 So. 2d at 125-26 (holding that a direct question regarding whether the attorney referred plaintiff to a particular treating physician violated the attorney-client privilege).

16. *See, e.g.*, *id. at* 125 (holding that a question by defense counsel regarding when the plaintiff obtained counsel does not invade the attorney-client privilege).

attorney cross-notices[17] the deposition and requests that the treating physician produce any documents regarding any other patients referred by the plaintiff's attorney.[18] At the deposition, the treating physician typically testifies to having no mechanism of keeping such records, yet admits that the plaintiff's attorney has referred other patients. The physician, however, does not know how many patients the plaintiff's attorney has referred and will not answer any questions regarding any particular patient, citing the physician-patient privilege.[19]

3. Conflict at Trial Between Medical Referrals and Attorney-Client Privilege

At trial, the plaintiff testifies about the injuries resulting from the accident and any treatment received from the physician. Continuing the strategical dance from the deposition, the insurer's attorney then asks the plaintiff who referred the treating physician. The plaintiff's attorney objects on grounds of the attorney-client privilege. Consequently, the judge must rule whether the protection of the attorney-client privilege extends to cover such a referral. Unfortunately for the ruling court, Texas has no case law addressing the issue.[20] Surprisingly, only a Florida appellate court has ruled on the issue, holding such a referral protected by the attorney-client privilege.[21] Depending on how the court rules, the plaintiff may or may not have to disclose the information.

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17. *See* TEX. R. CIV. P. 199.2(5) (allowing "a request in the notice for deposition that the witness produce at the deposition documents . . . within the scope of discovery and within the witness's possession, custody, or control").

18. This Article assumes that the plaintiff's attorney or some other attorney does not file a motion to quash the *duces tecum* to the treating physician. *See, e.g.*, *In re* Dolezal, 970 S.W.2d 650 (Tex. App.—Corpus Christi 1998, orig. proceeding) (quashing the defendant's *duces tecum* to the plaintiff's treating chiropractor regarding other patient referrals by the plaintiff's attorney). The chiropractor claimed the referrals were protected from disclosure by the patient-physician privilege. *Id.* at 651-53. This issue, however, is beyond the scope of this Article.

19. *See generally id.* at 652 (explaining that requiring the chiropractor to provide the requested information would not only violate the privacy rights of those patients not parties of the suit but also expose the chiropractor to liability for invasion of those privacy rights especially because that information was privileged); *see also* TEX. R. EVID. 509 (establishing the physician-patient privilege).

20. *See In re* Avila, 22 S.W.3d 349, 349 (Tex. 2000) (orig. proceeding) (J. Hecht, dissenting).

21. *See Burt*, 603 So. 2d at 125-26.

After the court rules on the issue, the plaintiff calls the treating physician to testify as an expert about the plaintiff's treatment, medical bills, limitations due to injuries allegedly sustained, and the pain associated with these injuries. The physician's expert testimony is crucial to the plaintiff's case because the testimony establishes the damages associated with the accident. Without the physician's expert testimony, the plaintiff would have only the medical bill entered into evidence as proof of damages. Having the plaintiff's physician on the stand, however, allows the physician not only to confirm the medical bills, but to testify further regarding future expenses.

Upon the conclusion of all testimony, the jury begins deliberations. Among the evidence before them, the jury considers the treating physician's expert testimony regarding the plaintiff's alleged injuries and treatment. Because the jury has the right to determine the treating physician's credibility, the court's ruling on the referral issue becomes critical. Should the jury find the treating physician credible, the jury likely will accept the medical bills as part of the plaintiff's damages and award the plaintiff an amount equal to the medical bills, as well as damages for physical pain and mental anguish. Should the jury hear testimony regarding the relationship between the plaintiff's attorney and treating physician, however, the jury may call into question the treating physician's credibility. While such testimony will not disprove the plaintiff's injuries, the testimony may lead a jury to review the medical bills and treatments for reasonableness.

This scenario happens all too often. In fact, the national media has recognized the problem.[22] Although a defendant may not dispute that the automobile accident occurred, the defendant has every right to question the true extent of the plaintiff's injuries. Furthermore, although the medical bills show certain injuries, such bills may constitute inaccurate and unreasonable charges. More importantly, if the attorney referred his client to a pre-selected physician, the physician may have inflated the medical bills.[23]

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22. *See 20/20 Wednesday: Doctors, Lawyers, Car Crashes and You* (ABC television broadcast, Aug. 25, 1999) (exposing the scheme driven by the lure of insurance money implicating "fraud rings across the country" which benefit the "big money makers in the scam"—doctors and lawyers).

23. *See, eg.*, Pamela Martineau, *DOJ and Insurance Commissioner Announce Arrest of Four Attorneys in Insurance Fraud Scheme*, METROPOLITAN NEWS-ENTERPRISE, Sept.

While the ethical consideration of such behavior lies beyond the scope of this Article, the evidentiary issue becomes clear. As a matter of public policy, the jury should be empowered to hear the truth. Permitting the jury to hear that an attorney refers numerous clients to the treating physician creates such a strong inference of impropriety that the jury should be allowed to hear this evidence to determine the legitimacy and reasonableness of the medical bills. Whether the attorney referred a client to a particular treating physician should not be cloaked under the attorney-client privilege.

III. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege stands as one of the oldest privileges recognized under Texas law.[24] The privilege "dates back to the Elizabethan days when its purpose was to protect the honor of attorneys."[25] Today, however, the privilege's purpose "is to promote the unrestrained communication and contact between an attorney and client" so that the client can communicate freely, thus allowing the attorney to give informed legal advice.[26] As one scholar has stated, the privilege seeks "to secure the free flow of information between attorneys and their clients on matters involved in litigation without the fear that such details of their communication will be disclosed."[27]

Scholars speculate on whether the benefits derived from the attorney-client privilege outweigh the injustice that often arises therefrom and the extent to which the privilege actually promotes

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29, 1995, at 6 (discussing an insurance kick-back scheme where a chiropractor inflated bills to insurance companies and then gave kick-backs to attorneys who referred the patients to him), LEXIS, Nexis Library, News Group File; Ron Nissimov, *Lawsuit Filed Alleges 'Ambulance Chasing'; Chiropractor, 2 Attorneys Accused of Scheme*, HOUS. CHRON., Mar. 13, 1999, at A37 (reporting an attorney-doctor scheme where an accident victim was referred to a doctor who inflated her medical treatment costs by thousands of dollars), LEXIS, Nexis Library, News Group File.

24. Lynne Liberato, *Attorney-Client Privilege in Texas*, 31 S. TEX. L. REV. 519, 519 (1990) (providing that "[t]he attorney-client privilege is among the oldest in Anglo-American law").

25. *Id.* (identifying the statutory evolution of the attorney-client privilege); *see also* Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 30 HOUS. L. REV. 489, 500-01 (1993) (indicating that, historically, the attorney-client privilege "was premised on a consideration for the oath and honor of the attorney").

26. West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding).

27. Lynne Liberato, *Attorney-Client Privilege in Texas*, 31 S. TEX. L. REV. 519, 519 (1990) (citing West v. Solito, 563 S.W.2d 240, 245 (Tex. 1998) (orig. proceeding)).

communication between the attorney and the client.[28] As a result, "courts have limited the privilege, both by creating exceptions and by strictly construing its terms."[29] Ultimately, however, the "[p]rivilege is designed to protect confidences in the narrowest possible way that will ensure client candor without interfering overly with the discovery of facts."[30]

A. *Scope of the Attorney-Client Privilege in Texas*

Texas Rule of Evidence 503(b)(1) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[31] Although the privilege clearly belongs to the client, the attorney may also claim the privilege on the client's behalf.[32] Furthermore, the person asserting the privilege has the burden of proving the privileged status of the communication in question.[33]

In establishing the privilege, the party asserting the privilege must make a prima facie showing. First, the asserting party must establish that the communication was confidential.[34] Second, the party must establish that the communication was made in furtherance of legal services to the client.[35] Third, the party must establish

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28. *See* Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 30 HOUS. L. REV. 489, 501-02 (1993) (noting that whether the attorney-client privilege promotes communication between the attorney and the client is a matter of speculation).

29. *Id.* at 502; *see also* Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (opining that the Texas Supreme Court's policy "has been to restrict application" of the attorney-client privilege "because it tends to prevent full disclosure of [the] truth").

30. Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 89-90 (1999).

31. TEX. R. EVID. 503(b)(1).

32. *See* TEX. R. EVID. 503(c).

33. *See* Osborne v. Johnson, 954 S.W.2d 180, 185 (Tex. App.—Waco 1997, orig. proceeding) (stating that one who seeks "protection from discovery of documents which it contends are protected by the attorney-client privilege bears the burden to produce evidence by affidavit or testimony demonstrating the applicability of the privilege").

34. *See* TEX. R. EVID. 503(b)(1) (limiting the application of the attorney-client privilege to confidential communications).

35. *See id.* (providing that the attorney-client privilege applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services").

that the communication was between the attorney and the client, or their respective agents.[36]

In determining privilege status, Texas Rule of Evidence 503 identifies what constitutes a confidential communication.[37] The Rule provides, "a communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[38] When determining whether a party intended a communication to remain confidential, Texas courts look to the parties' intent at the time of making the communication.[39] If the party asserting the privilege makes the communication in the presence of, or disclosed the communication to, a third party, such disclosure automatically "eliminates the intent for confidentiality on which the privilege rests."[40] Therefore, if the attorney or the client communicates in front of a third person, the attorney-client privilege does not apply because the party did not intend the communication to remain confidential. In addition, the attorney-client privilege does not protect communications made between the attorney and a third party.[41]

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36. TEX. R. EVID. 503(b)(1)(A)-(E). The general rule of privilege applies to confidential communications made:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
(B) between the lawyer and the lawyer's representative;
(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of lawyer representing another party in a pending action and concerning a matter of common interest therein;
(D) between representatives of the client or between the client and a representative of the client; or
(E) among lawyers and their representatives representing the same client.

Id.

37. *See* TEX. R. EVID. 503(a)(5).

38. *Id.*

39. *See* Osborne v. Johnson, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding) (asserting "[t]he issue of confidentiality focuses on the intent of the parties at the time the communications are made").

40. *See* Apex Mun. Fund v. N-Group Sec., 841 F. Supp 1424, 1426 (S.D. Tex. 1993) (citing Hodges, Grant & Kaufmann v. United States Gov't, 768 F.2d 719, 720-21 (5th Cir. 1985)).

41. *See* Methodist Home v. Marshall, 830 S.W.2d 220, 224 (Tex. App.—Dallas 1992, orig. proceeding) (holding that the attorney-client privilege does not protect third-party communications).

The attorney-client privilege protects only those confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client."[42] In contrast, "[c]ommunications for other purposes are not protected merely because one of the parties is [an attorney]."[43] For example, the privilege does not protect communications where no attorney-client relationship exists,[44] or where a party employs an attorney in a non-legal capacity.[45]

The attorney-client privilege not only protects communications between the attorney and the client, but also communications between other specified individuals.[46] A party may assert the attorney-client privilege to protect communication "by the client or a representative of the client, or the client's lawyer or a representative of the lawyer."[47] In addition, a communication made "between the lawyer and the lawyer's representative" may also receive protection under the privilege.[48] A representative of a lawyer, however, is strictly defined to include only a person "employed by the lawyer to assist the lawyer in the rendition of professional legal services."[49]

Once the party asserting the attorney-client privilege establishes a prima facie showing of the privilege, the party seeking discovery of the privileged communication must submit evidence that refutes the asserted privileged.[50] If the party seeking discovery introduces such evidence, "the trial court must conduct an in camera review of the [communication] to determine whether the asserted privilege

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42. TEX. R. EVID. 503(b).

43. Thacker v. State, 852 S.W.2d 77, 82 (Tex. App.—Austin 1993, writ denied).

44. *In re* Ford Motor Co., 988 S.W.2d 714, 719 (Tex. 1998) (orig. proceeding) (determining that no attorney-client relationship existed at the time the communication was made; therefore, the attorney-client privilege did not apply).

45. *See In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (providing that no privilege applies "if the attorney is acting in a capacity other than that of an attorney").

46. *See* TEX. R. EVID. 503(b)(1)(A)-(E).

47. TEX. R. EVID. 503(b)(1)(C).

48. TEX. R. EVID. 503(b)(1)(B).

49. TEX. R. EVID. 503(a)(4)(A).

50. Osborne v. Johnson, 954 S.W.2d 180, 185 (Tex. App.—Waco 1997, orig. proceeding).

applies."[51] If the court decides that the attorney-client privilege does apply, the only other means of discovering the otherwise privileged communication is through an exception[52] to the attorney-client privilege or through waiver.[53]

B. *Exceptions to the Attorney-Client Privilege*

Although a communication may initially receive protection under the attorney-client privilege, opposing counsel may still discover such communication if it falls under one of the exceptions to the attorney-client privilege.[54] None of the exceptions to the rule, however, apply to attorney referrals for medical treatment.[55] Nevertheless, the Texas Rules of Evidence, in general, does provide that if any privilege has been conferred under any of the rules, such as the attorney-client privilege, a party can waive the privilege if "the person . . . voluntarily discloses or consents to disclosure of

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51. *Id.*; *see also* Marathon Oil Co. v. Moyé, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994, orig. proceeding) (indicating "[t]he trial court determines whether the privilege applies to the tendered documents during an in camera inspection").

52. *See* TEX. R. EVID. 503(d)(1)-(5). The Rules of Evidence provides that no attorney privilege exists under the following circumstances:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;
(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Id.

53. *See* TEX. R. EVID. 511(1) (providing "the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged"); *see also Moyé*, 893 S.W.2d at 590 (asserting that a party waives the attorney-client privilege "[w]hen a party uses the privilege as a sword rather than a shield").

54. For purposes of this Article, "exceptions" refers to those areas of the attorney-client privilege that apply in the attorney referral context instead of the "exceptions" specifically listed in the privilege.

55. See TEX. R. EVID. 503(d)(1)-(5) (failing to specifically address attorney referrals).

any significant part of the privileged matter unless such disclosure itself is privileged."[56]

1. Waiver

As previously noted, the client holds the attorney-client privilege and, thus, also has the power to waive the privilege.[57] In addition, the attorney may waive the privilege under the client's authority.[58] Texas law provides two types of waiver — express and implied.[59] Express waiver "occurs if a client or his lawyer reveals a privileged communication to a third party."[60] Implied waiver occurs when a party does not assert the attorney-client privilege to an otherwise confidential document.[61] If a question arises as to the waiver of the attorney-client privilege, "the party asserting the privilege has the burden of proving that no waiver has occurred."[62]

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56. TEX. R. EVID. 511(1).

57. *See* TEX. R. EVID. 503(c) (providing that the client may claim the attorney-client privilege); *see also* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 164 (3d ed. 1997) (indicating that the client is the one who ultimately decides whether to claim or waive the attorney-client privilege); Donald B. McFall & Caroline Baker Little, *Privileges Under Texas Law: A Dying Breed?*, 31 S. TEX. L. REV. 471, 476 (1990) (explaining that the client "as holder of the privilege, has the sole power to waive it").

58. *See* TEX. R. EVID. 503(c) (allowing the person who was the client's attorney "to claim the privilege but only on behalf of the client"); *see also* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 165 (3d ed. 1997) (providing that, ordinarily, it is the attorney's obligation to assert the attorney-client privilege on behalf of the client).

59. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 159 (3d ed. 1997) (noting "[a] multitude of terms are applied to waivers of the privilege" including express and implied waivers); Donald B. McFall & Caroline Baker Little, *Privileges Under Texas Law: A Dying Breed?*, 31 S. TEX. L. REV. 471, 476 (1990) (providing examples of how the attorney-client privilege is expressly or impliedly waived); *see also* TEX. R. EVID. 511 (establishing the waiver of a privilege by voluntary disclosure).

60. Donald B. McFall & Caroline Baker Little, *Privileges Under Texas Law: A Dying Breed?*, 31 S. TEX. L. REV. 471, 476 (1990).

61. *See id.* at 476-77 (examining various ways an attorney or a client can impliedly waive the attorney-client privilege).

62. Jordan v. Court of Appeals for the Fourth Supreme Judicial Dist., 701 S.W.2d 644, 649 (Tex. 1985) (orig. proceeding).

2. Offensive Use

A party may also waive the attorney-client privilege through the offensive use doctrine.[63] When the attorney-client privilege "is being used as a sword rather than a shield, the privilege may be waived."[64] In other words, the doctrine provides that a plaintiff cannot seek affirmative relief and simultaneously shield confidential information pertinent to the plaintiff's claim.[65] As the Texas Supreme Court has warned, however, waiver of the attorney-client privilege through offensive use "should not be lightly found."[66]

The supreme court has provided three factors that should guide a court in determining whether waiver of the attorney-client privilege has occurred. First, "the party asserting the privilege must seek affirmative relief."[67] Second, the privileged information "must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted."[68] Third, the "disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence."[69] If the party asserting the offensive use waiver fails to establish each of these three requirements, the court must uphold the attorney-client privilege.[70]

IV. *IN RE* AVILA

The Texas Supreme Court faced the issue of whether the attorney-client privilege covers physician referrals in *In re Avila*.[71] Rather than establish a clear rule, however, the court denied the

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63. *See* Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding) (holding that the offensive use waiver applies to the attorney-client privilege).

64. *Id.*

65. *See id.*

66. *Id.* (noting that "[p]rivileges . . . represent society's desire to protect certain relationships").

67. *Id.*

68. *Davis*, 856 S.W.2d at 163.

69. *Id.*

70. *See id.* (stating "[i]f any one of these requirements is lacking, the trial court must uphold the privilege").

71. 22 S.W.3d 349 (Tex. 2000) (orig. proceeding) (J. Hecht, dissenting). Author Martin J. Phipps served as co-counsel representing Allstate before the Texas Supreme Court in *In re Avila*.

petition for writ of mandamus without an opinion.[72] Despite the majority's reluctance to hear the issue, Justice Hecht filed a vigorous dissent arguing that the attorney-client privilege should apply to attorney medical referrals.[73]

A. *Background*

Plaintiff, Maria Avila ("Avila"), was involved in an automobile accident in July 1996.[74] Avila subsequently sued the responsible party for personal injuries allegedly suffered in the accident.[75] Because the responsible party had no insurance, Avila also sued her insurance company, Allstate Indemnity Company ("Allstate"), for breach of contract stemming from non-payment of uninsured motorist benefits.[76] The responsible party defaulted leaving Allstate to defend Avila's breach of contract claim.[77]

In reviewing Avila's claim, Allstate obtained Avila's medical records.[78] Thereafter, Allstate disputed the reasonableness of Avila's medical treatment in two respects.[79] First, Allstate questioned the genuineness of Avila's claim because she sought further medical treatment only after retaining an attorney more than one year after the accident.[80] Second, Allstate expressed concern because the physician who treated Avila was frequently used by personal injury lawyers in the San Antonio area.[81]

During discovery, Allstate deposed Avila regarding her medical treatment.[82] At the deposition, Avila admitted that she was referred to the physician and that she had never heard of the physician before retaining her attorney.[83] However, when Allstate asked Avila who referred her to the physician, Avila asserted the

72. *See In re* Avila, 22 S.W.3d 349, 349 (Tex. 2000) (orig. proceeding) (J. Hecht, dissenting).

73. *See id.*

74. *Id.*; *see also* Brief for Real Party in Interest at 2, *In re* Avila (No. 99-0633).

75. Brief for Real Party in Interest at 2, *In re* Avila (No. 99-0633).

76. *In re* Avila, 22 S.W.3d at 349.

77. Brief for Real Party in Interest at 2, *In re* Avila (No. 99-0633).

78. *Id.*

79. *Id.*

80. Brief for Real Party in Interest at 2-3, *In re* Avila (No. 99-0633).

81. Brief for Real Party in Interest at 3, *In re* Avila (No. 99-0633).

82. *In re* Avila, 22 S.W.3d at 349.

83. *Id.*

attorney-client privilege and refused to answer.[84] Nonetheless, at a pre-trial hearing, the trial court ordered Avila to answer the question posed by Allstate.[85]

Avila subsequently sought mandamus review of the trial court's order to the court of appeals.[86] The Fourth Court of Appeals, however, rejected Avila's writ of mandamus.[87] Avila then petitioned the Texas Supreme Court.[88] After briefing, the court denied Avila's writ of mandamus without issuing an opinion. Because the court did not issue an opinion, it remains difficult to determine exactly on what grounds the supreme court denied Avila's writ. Justice Hecht, however, did issue a dissenting opinion.[89]

B. *Justice Hecht's Dissenting Opinion*

In his dissenting opinion, Justice Hecht noted that no Texas court, and only one court in the United States,[90] had discussed the issue of "whether the attorney-client privilege protects a party from being required to disclose that her attorney referred her to a physician for treatment."[91] Justice Hecht argued that the court

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84. *Id.* at 349-50. The questions by Allstate's attorney to Avila were:

Q. Before you treated with [your physician], had you hired a lawyer or gone to see a lawyer for the accident in July of 1996?
A. I had talked with [my lawyer].
Q. And who referred you to [your physician]?
[AVILA'S ATTORNEY]: I'm going to instruct you not to answer as far as any attorney/client communications.
Q. Are you going to refuse to answer based on the advice of your lawyer?
A. Yes.
Q. Had you ever heard of [your physician] before that?
A. No.

Brief for Real Party in Interest at 3, *In re* Avila (No. 99-0633) (quoting the deposition of Maria Avila).

85. *In re* Avila, 22 S.W.3d at 350.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 349.

90. *In* re Avila, 22 S.W.3d at 349 (referring to Burt v. Gov't Employees Ins. Co., 603 So. 2d 125 (Fla. Dist. Ct. App. 1992)).

91. *Id.* Although not cited by Justice Hecht or Allstate in its Brief, the Texas Supreme Court has examined attorney referral for medical treatment. The Texas Supreme Court addressed the referral in the context of an improper jury argument. *See* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 838-40 (Tex. 1979) (considering the use of hyperbole as it applied the plaintiff's search for a doctor). The defense attorney demonstrated during the trial: (1) the plaintiff had been referred by her attorney to her treating physician; (2) the

should grant Avila's writ of mandamus because attorney referral for medical treatment "arises in many personal injury lawsuits" and, furthermore, "a rule requiring disclosure of such information is a significant incursion into the province of the attorney-client privilege."[92] To bolster his position, Justice Hecht analyzed Allstate's four arguments as to why Avila's referral was not protected by the attorney-client privilege: confidentiality, legal services, waiver, and offensive use.[93]

1. Confidentiality

Under Texas Rule of Evidence 503(b)(1), the attorney-client privilege attaches only to confidential communications.[94] Intent determines whether a communication retains confidential status.[95] No intent exists, however, once the client, attorney, or attorney's representative discloses the communication to a third party.[96] Allstate initially argued that the court should deny Avila's writ of mandamus because Avila failed to establish that she intended the

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plaintiff traveled an extensive distance for treatment; and (3) the plaintiff's attorney's name was on many of the medical and pharmacy bills. *Id.* at 837-39. After a non-favorable verdict, the plaintiff's attorney appealed complaining that the defense attorney's argument, that a "sham or a plot" existed between the plaintiff's attorney and the plaintiff's treating physician, was improper jury argument. *Id.* at 836. The Texas Supreme Court upheld the jury's verdict. *Id.* They found the defense attorney's argument was supported by "direct evidence of a close relationship between [the plaintiff's] attorney . . . and [the plaintiff's treating physicians]." *Id.* at 838. Additionally, the court declared: "Whether by cross-examination or advocacy, the relationship between witnesses and a party is properly weighed, evaluated, and tested. It is the jury's function to evaluate the evidence in that context." *Id.*

92. *In* re Avila, 22 S.W.3d at 349.

93. *Id.* at 350-51.

94. *See* TEX. R. EVID. 503(b)(1). Confidential communication is defined as follows: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5).

95. *See* Osborne v. Johnson, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding) (asserting "[t]he attorney-client privilege only protects confidential communications" and furthermore, "[t]he issue of confidentiality focuses on the intent of the parties at the time the communications are made").

96. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 158 (3d ed. 1997) (noting "[d]isclosure of the privileged communication to third person *at the time* of the communication may prevent the creation of the privilege, because the necessary element of confidentiality will be found lacking"). On the other hand, "[d]isclosure to third persons *after* the making of an otherwise privileged communication may constitute a waiver of the privilege." *Id.*

communication with her attorney regarding the referral to the physician to remain confidential.[97] Allstate asserted that through Avila's testimony, "it is clear the communication was disclosed to a third party, [the treating physician]."[98] Furthermore, Allstate argued that the physician would know of the referral because Avila could not pay for the medical treatment and because Avila would tell the physician who referred her to him.[99]

Nevertheless, Justice Hecht dismissed this argument, claiming that Avila and her attorney intended the communication to remain confidential because the referral to the physician by her attorney "would hurt [Avila's] position in the case."[100] Furthermore, Justice Hecht believed it "obvious" that Avila and her attorney intended to keep the referral confidential.[101] Otherwise, he argued, the parties would have acted "against their own interests."[102] Justice Hecht tried to make a clear distinction between succeeding in keeping a communication confidential and intending a communication to remain confidential.[103]

Justice Hecht's distinctions do not overcome waiver of the attorney-client privilege based on third party communication. Although Avila and her attorney may have intended the communication to remain confidential, when Avila disclosed the communication to a third party (the physician), the disclosure eliminated the intent upon which the privilege rests. Through a plain application of the law, such a disclosure creates an unsuccessful attempt at keeping the communication confidential. Indeed, Avila's testimony that she had never heard of the physician before being referred to him and that she was going to pay the physician "when [she] could" evidences disclosure to the third party physician.[104]

Although Allstate conceded that the record does not indicate whether Avila actually made the disclosure to the physician, Allstate argued that this communication must have been disclosed to

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97. *In re* Avila, 22 S.W.3d at 350.

98. Brief for Real Party in Interest at 8, *In re* Avila (No. 99-0633).

99. *In re* Avila, 22 S.W.3d at 350.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Brief for Real Party in Interest at 8, *In re* Avila (No. 99-0633) (quoting the deposition of Maria Avila).

the physician at the time of her initial visit in order to make payment arrangements.[105] Justice Hecht countered that, for all the facts available from the record, the physician "might have treated Avila free of charge."[106] The record clearly indicates, however, that when asked "[h]ow were you able to treat with [the physician] when you didn't have any insurance or any money?,"[107] Avila answered, "I was going to pay him when I – when I could."[108] Such an admission indicates that Avila must have disclosed the referral in order to actually receive treatment from the physician.

Based on the language of his dissent, Justice Hecht appears to advocate a stricter waiver standard. Justice Hecht suggests that if Allstate had produced copies of medical records demonstrating Avila told the physician about the referral, then the attorney-client privilege would be waived.[109] Although this standard may initially seem acceptable, several scenarios exist that would make such a standard unjust. For example, Justice Hecht's standard becomes impractical if the plaintiff's attorney informs the medical providers to (1) take off the portion of the patient history or in-take form regarding referrals; (2) deliver all of their medical reports directly to the plaintiff and not to the attorney; or (3) stop supplying the attorney with a copy of the reports.

Furthermore, under these facts, such a standard would not allow the jury to make an informed decision and would continue to perpetuate the deception that the plaintiff suffered legitimate injuries based solely on the fact that the plaintiff received medical treatment. Allowing the discovery and admissibility at trial of whether the plaintiff's attorney referred his client to the medical provider provides a better standard. Such an approach allows the jury to determine if such conduct was acceptable under the circumstances and how much weight to give the treating physician's testimony.

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105. *In re* Avila, 22 S.W.3d at 350. Justice Hecht further argued that "[t]he additional problem with Allstate's argument is that it has no more support in the record than it does in logic." *Id.*

106. *Id.*

107. Brief for Real Party in Interest at 8, *In re* Avila (No. 99-0633).

108. *Id.*

109. *See In re* Avila, 22 S.W.3d at 350 (stating "Allstate does not argue that Avila failed to show that the privilege was not waived by disclosure" to the physician). Justice Hecht contended that Allstate erred by arguing that Avila and her attorney *intended* to keep the referral confidential instead of proving that Avila had actually disclosed the referral. *See id.*

2. Legal Services

In addition to arguing that Avila did not intend to keep the referral communication privileged, Allstate further contended the communication lacked privilege because the referral did not relate to the rendition of legal services.[110] Specifically, Allstate argued that although the referral constitutes a communication between attorney and client, such communication relates to non-legal matters.[111] Justice Hecht, however, dismissed this argument because Allstate had previously claimed that Avila's referral to the physician by her attorney was done to strengthen her claim for damages.[112] Therefore, in Justice Hecht's opinion, Allstate implied that the referral constituted the rendition of legal services.[113]

Justice Hecht's analysis improperly construes the purpose of the attorney-client privilege. As discussed, the stated purpose of the attorney-client privilege is to encourage the free flow of information between the attorney and the client so that the attorney may render legal services properly.[114] Justice Hecht, however, misconstrues what constitutes "rendition of legal services." Clearly, the referral to the physician does not help the "legal" development of her case; rather, a referral only helps the "damage" element of her case, a fact question for the jury. Nevertheless, some may claim that the development of damages constitutes a legal concern. Although technically correct, in cases of attorney referral, the attorney, through his relationship with the medical provider, potentially creates damages that otherwise would not exist. Full disclosure of the relationship between attorney, physician, and client can help to protect against such behavior.

Avila's attorney referred her to the treating physician in order to strengthen her damages claim because Avila needed to prove dam-

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110. *Id.*

111. Brief for Real Party in Interest at 9, *In re* Avila (No. 99-0633).

112. *In re* Avila, 22 S.W.3d at 350.

113. *See id.*

114. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (discussing that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding) (reiterating "that the purpose of the attorney-client privilege is to promote the unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought").

ages to maintain a successful suit. Because Avila had not sought medical treatment for over a year since the accident, Avila needed to produce medical bills so the jury had evidence that she suffered legitimate injuries. The success of Avila's case hinged on the physician's expert testimony. Without the physician's testimony or medical bills, Avila could not recover for past or future medical care. In addition, medical bills evidence physical pain and mental anguish.

Despite Justice Hecht's conclusion, however, the act of referring Avila to the physician does not constitute the rendition of legal services. To the contrary, such an act amounts solely to the rendition of medical services—services apparently unnecessary prior to Avila retaining an attorney. Cloaking the referral and subsequent testimony regarding the relationship between the attorney, client, and physician allows the attorney to hide behind the protections of the attorney-client privilege at the expense of the jury. For a finder of fact to properly operate, both parties must have the opportunity to present the entire situation.

3. Waiver

Allstate also maintained that Avila waived any privilege after testifying of having been referred to the physician.[115] Because Avila's testimony, allowed without objection, clearly acknowledges that a referral to the physician occurred, the source of the referral cannot remain privileged. Nonetheless, Justice Hecht dismissed this argument, noting that "the mere fact of referral does not waive the privilege for all related information."[116]

Justice Hecht's rationale appears logical. Assume, *arguendo*, that the "fact" of referral does not waive the privilege. At trial, the insurer's attorney will simply argue that "someone" referred the plaintiff to a physician that the plaintiff had never heard of before retaining the attorney. Most jurors naturally will assume that the attorney referred the plaintiff to the physician. By continuing the charade that the attorney-client privilege remains intact after the disclosure of the fact of referral ignores the doctrine of waiver and insults the jury. A better practice is to allow an open discussion of the referral once testimony of the referral enters the record. Such

115. *In re* Avila, 22 S.W.3d at 351.
116. *Id.*

an approach allows the jury full access to the information and arguments needed to properly weigh the treating physician's testimony.

4. Offensive Use

Finally, Allstate complained that Avila used the attorney-client privilege offensively to conceal evidence that would dispute the reasonableness and necessity of her treatment with the physician.[117] More specifically, Avila used the privilege as a sword to cut away relevant evidence from Allstate's assertion regarding the reasonableness and necessity of a physician referral more than a year after the accident.[118] Such an offensive use would waive the attorney-client privilege.[119]

Justice Hecht rejected this contention, claiming that Allstate failed to show "that evidence of referral goes to the very heart" of Avila's claim.[120] In other words, under the offensive use exception to the attorney-client privilege, Allstate had to show that the information to be disclosed "would in all probability be determinative of the outcome."[121] Accordingly, Justice Hecht concluded that Allstate failed to demonstrate that the disclosure of the referral would do more than simply reduce the amount of Avila's medical expense award.[122]

Here, Justice Hecht inserts his opinion that attorney referral to the medical provider will have only "some effect" on a plaintiff's recovery instead of going "to the very heart" of Avila's claim.[123] To the contrary, Avila brought a personal injury suit based largely upon the medical treatment of the physician. In such a suit, the plaintiff has the burden of proof to demonstrate the reasonableness

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117. *Id.*

118. *Id.*

119. *See* Marathon Oil Co. v. Moyé, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994, orig. proceeding) (stating "[w]hen a party uses the privilege as a sword rather than a shield, he waives the privilege").

120. *In re* Avila, 22 S.W.3d at 351.

121. *Id.*

122. *Id.*

123. *See Id.* In determining whether information constitutes the heart of the matter, the court asks whether "the privileged information sought . . . if believed by the fact finder, in all probability . . . would be outcome determinative of the cause of action asserted." Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding) (allowing waiver when "the privilege is being used as a sword rather than a shield").

and necessity of medical treatment.[124] The crucial inquiry by the jury, therefore, is to determine the reasonableness and necessity of Avila's medical treatment. In essence, proving damages constitutes a crucial element of every tort. In this case, the dispute concerned the reasonableness and necessity of Avila's medical treatment. In all probability, the jury could reasonably conclude that Avila's referral to the physician made the reasonableness and necessity of her medical treatment highly suspect because the treatment did not begin until after Avila retained an attorney. Because the only dispute focused on Avila's alleged injuries from the accident, the information would clearly be outcome determinative for Avila's cause of action.

V. CONCLUSION

Some commentators have argued that courts and legislatures should abolish the attorney-client privilege because of the privilege's adverse impact on finding the truth and administering justice.[125] The attorney-client privilege, however, primarily serves legitimate purposes. For instance, a communication should remain privileged when the harm to the attorney-client relationship outweighs the benefit gained through complete disclosure.[126] Protecting physician referrals by attorneys, however, does not comport with this purpose. The time has come to allow full disclosure of attorney referrals for medical treatment to the jury. To continue protecting these referrals is to perpetuate a fraud on the judicial

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124. *See* Rivas v. Garibay, 974 S.W.2d 93, 95-96 (Tex. App.—San Antonio 1998, pet. denied) (holding "[t]he plaintiff has the burden to offer specific evidence of the reasonableness and necessity of medical expenses, in addition to proof of the actual amount expended").

125. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 33 (1998) (arguing that the attorney-client privilege should be abolished because it has "dubious value to clients and society as a whole"); *see also* Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 51 (1982) (proposing that an attorney should have a duty "to disclose all material evidence favorable to the other side" and "[t]his requirement should not be . . . limited by either the professional rule protecting client confidences or the attorney-client privilege").

126. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (McNaughton rev. 1961) (listing this as one of the four fundamental conditions necessary to establish a privilege); *see also* Donald B. McFall & Caroline Baker Little, *Privileges Under Texas Law: A Dying Breed?*, 31 S. TEX. L.J. 471, 507 (1990) (identifying that Texas courts and lawmakers perceive "that privileges should be strictly confined within the narrowest possible limits").

system, while defeating society's broader interest of determining truth and administering justice.

In order to seek justice and assure the proper course of litigation, Texas courts should allow the discovery and admissibility at trial of whether the plaintiff's attorney referred his or her client to the medical provider. Such practice allows the jury to determine if this conduct is acceptable when deciding upon the reasonableness and necessity of the medical expenses incurred by the plaintiff. Moreover, full disclosure does not prevent the free flow of information between the attorney and client for the rendition of legal services. To the contrary, the disclosure only discourages attorneys from developing questionable relationships with medical providers in order to "build" medical bills for a client. Allowing the jury to hear evidence of attorney referral for medical treatment would constitute a strong step forward in the fight against insurance fraud across Texas.